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March 16, 2001

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**SUBJECT: Submittal of Statement of Dispute to Dispute Resolution Committee Regarding
Request for Extension of Milestones for Waste Area Group 7, Operable Unit (OU) 7-
10 (EM-ER-01-048)**

REFERENCES:

- 1) February 26, 2001, Letter from Kathleen E. Hain to W. Pierre (EPA Region 10) and D. Nygard (Idaho DEQ), Subject: "Request for Extension of Deadlines—Waste Area Group 7, Operable Unit (OU) 7-10 (EM-ER-01-028)"
- 2) March 9, 2001, Letter from D. Nygard to K. Hain, Subject: "Denial of 2/26/2001 Request for Extension of Deadlines for Waste Area Group 7, Operable Unit (OU) 7-10"
- 3) March 12, 2001, Letter from W. Pierre to K. Hain, Subject: "Request to Extend Deadlines for Waste Area Group 7, Operable Unit 7-10"

To the Dispute Resolution Committee:

In accordance with Sections 9.2(a), (d), and 13.6 (which requires that disputes over requests for extension be invoked within seven days of receipt of a statement of nonconcurrence), of the INEEL Federal Facility Agreement and Consent Order (FFA/CO), this letter is a written Statement of Dispute arising from References 2 and 3,

denying DOE-ID's Request for Extension of Deadlines (Reference 1). The Request for Extension set forth the good cause for the requested extensions. The specific extensions requested were as follows:

- 1) Draft Stage II Remedial Action Report--from the current deadline of April 2003 to a new deadline of August 2010 (88 months).
- 2) Draft Stage III Remedial Design (90% design)--from the current deadline of April 2003 to a new deadline of August 2013 (124 months).
- 3) Draft Stage III Remedial Action Work Plan and Operations and Maintenance (O&M) Plan--from the current deadline of September 2003 to a new deadline of February 2016 (149 months).

The work that will be affected by this dispute is the gathering of information, analysis, design, preparation and submittal of the cited documents, and any and all work that is dependent upon the completion of those documents.

It is the position of DOE-ID that Reference 1 and its supporting documents fully demonstrate that there is good cause for the requested extensions. The additional time needed to accomplish each stage of the OU 7-10 remedial action is the direct result of our best efforts to work out precisely what needs to be done in order to accomplish the objectives of the OU 7-10 Record of Decision with full consideration for the safety and health of both the workers who will be carrying out the work and the members of the public who could be affected if the work were not carried out with the utmost attention to minimizing releases of hazardous substances to the environment.

Both DEQ and EPA representatives have participated in weekly meetings in which the precise steps that must be undertaken at OU 7-10 have been discussed. DOE-ID will need much more time than we had estimated several years ago, before we had an approved design for retrieval and an opportunity to perform a more detailed analysis of the specific work that would be needed to accomplish the goals of the OU 7-10 ROD. The information which demonstrates the necessity of the additional time is set out comprehensively in Reference 1 and its supporting documents, all of which are attached to this Statement of Dispute.

Response to the DEQ Letter

DOE-ID will now respond to the reasons given for denial of the extensions by Reference 2:

The first two paragraphs of Reference 2 assert that DEQ "does not find good cause" and that DOE-ID's proposed schedule extensions "are not reasonable." There is no

specific response given to any of the supporting arguments or documentation that were provided in Reference 1. These statements are conclusions without supporting rationale. While the FFA/CO does not require DEQ to provide a detailed justification for such a denial, the lack of such justification is absolutely relevant to your consideration of the matters in dispute.

Paragraph 3 of Reference 2 cited the 1997 Agreement to Resolve Disputes (97 Resolution), which included agreement in Section 23(b) to select what are now the three existing deadlines cited above. While the result was an extension of previous deadlines, the 97 Resolution did not prohibit further extensions that could be justified under the process in Part XIII of the FFA/CO. In fact, in Section 24 of the 97 Resolution, DOE, EPA and DEQ agreed that "should current plans for the cleanup of Pit 9 be substantially changed . . . the parties will discuss and agree on appropriate measures for Pit 9 . . . and may not necessarily include all items identified in Part 2.11 of the FFA/CO Action Plan." Thus, the 97 Resolution recognized the very real possibility of future revision of the remedial action at OU 7-10, in accordance with the FFA/CO decision process. Citation of the 97 Resolution was therefore not a necessary element of the extension request in Reference 1.

Paragraphs 3 through 5 of Reference 2 appear to be asserting that the 97 Resolution requires that the OU 7-10 remedial actions must precede the preparation of the Remedial Investigation/Feasibility Study (RI/FS) for WAG 7 as a whole, designated OU 7-13/14 (including final remedial action for OU 7-10). We believe these references to the discussion of OU 7-13/14 in the 97 Resolution have been taken out of context. While it is true that the 97 Resolution authorized extension of the OU 7-13/14 RI/FS deadline "to allow for Pit 9 information to be available for evaluation in the 7-13/14 BRA, RI/FS and ROD" (Section 26), the document also went on to state in Section 27:

The parties further agree, however, that should it appear that the submission of the Limited Production Test (LPT) Report for Pit 9 will not be completed in a timely manner . . . DOE shall assume that Pit 9 information will not be used in the above-referenced 7-13/14 deliverables. At that time, DOE shall immediately initiate independent characterization and treatability studies for purposes of evaluating the feasibility of alternatives for 7-13/14, the parties shall discuss the establishment of appropriate deadlines for 7-13/14 deliverables, and subsequently DOE shall submit a revised RI/FS SOW for 7-13/14. [Emphasis added.]

The documents that were agreed to by DEQ and EPA in 1997 pursuant to these provisions in the 97 Resolution, also accept as a legitimate alternative proceeding with the OU 7-13/14 remedial action process without prior completion of the OU 7-10 remedial action. The Revised Scope of Work for Operable Unit 7-13/14 Waste Area Group 7 Comprehensive Remedial Investigation/Feasibility Study (September 1997) (97 SOW for OU 7-13/14) agreed to by EPA and DEQ states on page 1 that:

This SOW has been revised to address contingency planning in the event the Pit 9 Interim Action under the OU 7-10 ROD is unable to supply needed information in a timely manner. This information includes characterization data concerning contaminants of concern, migration of contaminants, and waste container integrity. . . . If and when it becomes apparent that some of the required data will be provided by the OU 7-10 ROD work, a second addendum to the work plan . . . will be written to delete the unneeded scope.

A similar reservation is made at page 19, and at page 21, it also states:

The Pit 9 Interim ROD states that information on the effectiveness and cost of Pit 9 remediation will be used for the OU 7-13/14 RI/FS. Deliverables from the Pit 9 ROD, if available to support the schedule in Section 11 [of the 97 OU 7-13/14 SOW], will be evaluated during the OU 7-13/14 FS for technology performance and cost information. This information will be used in the OU 7-13/14 FS as a basis for screening some technologies. [Emphasis added.]

In other words, the 97 SOW for OU 7-13/14 was designed to go forward with or without prior completion of the Pit 9 Interim Remedial Action (IRA). While it was hoped that the IRA for the Stage II 20X20 foot demonstration and/or the one acre of Pit 9 could provide information that would support the remediation of the total 88 acres of pits and trenches in WAG 7, the Pit 9 effort was never intended to delay that larger remedial investigation. Indeed, the EPA, DEQ and DOE agreed that, should Stage II of the Pit 9 effort fail, the final remediation of OU 7-10 would simply become part of the OU 7-13/14 remedial action. (Section 2.2, page A-3, Remedial Design/Remedial Action Scope of Work and Remedial Design Work Plan: Operable Unit 7-10 (Pit 9 Project Interim Action), October 1997.)

In fact, the possibility envisioned by the DEQ, EPA and DOE in Section 27 of the 97 Resolution has come to pass. In the August 1998, Addendum to the Work Plan for the Operable Unit 7-13/14 Waste Area Group 7 Comprehensive Remedial Investigation/Feasibility Study (98 OU 7-13/14 Work Plan), at page 1-1, the EPA, DEQ and DOE agreed that:

Because of subsequent delays in the Pit 9 project, the U.S. Department of Energy, Idaho Operations Office (DOE-ID); the U.S. Environmental Protection Agency (EPA); and the Idaho Department of Health and Welfare (IDHW) have devised an alternate strategy that is not dependent on information from Pit 9. The revised strategy and additional requirements for conducting the WAG 7 comprehensive RI/FS are defined in this addendum to the original WAG 7 Work Plan . . . for Operable Unit (OU) 7-13/14. [Emphasis added.]

Similarly, at page 1-4, the Work Plan states that "activities described in this addendum will proceed independently of the Pit 9 project." A detailed discussion of the relationship between the actions at OU 7-10 and OU 7-13/14 is found at pages 4-1 to 4-2.

Contrary to the assertions in Reference 2, DOE has already undertaken an extensive program of probing the WAG 7 pits and trenches--not just Pit 9--to obtain characterization data, has moved forward with studies on alternative remedial methods, and has recently submitted further proposed modifications of the RI/FS Statement of Work and Work Plan on January 2, 2001. While DEQ and EPA did not concur with the modifications, it is possible that the adoption of the modifications will be the subject of a separate dispute resolution process and will still go forward. With respect to deadlines for OU 7-13/14, DOE has communicated repeatedly to EPA and DEQ that we believe we can meet the existing deadline of March 29, 2002, for submittal of the draft RI/FS, and do not currently foresee the need to extend that deadline.

Paragraph 5 of Reference 2 asserts that the proposed extensions would be "counter to the intent of the original 1993 Record of Decision for the Pit 9 project, [and] our revision of the project under the 1997 Agreement to Resolve Disputes." Although it is not explicitly stated what the term "intent" refers to, we do intend to modify the original ROD. The fact that the FFA/CO allows for extension of previously agreed deadlines means that changes in the "intent" of a ROD with regard to remedial action milestones may be fully appropriate in the light of further information and analysis.

Paragraph 6 of Reference 2 asserts that the proposed extensions would "jeopardize" compliance with a commitment made in the 1995 Settlement Agreement (95 SA) concerning spent nuclear fuel and shipment of stored transuranic waste (as distinct from historically disposed waste) to the Waste Isolation Pilot Plant. Although DOE disagrees with this assertion, the attempt of Reference 2 to connect remedial actions under CERCLA and the FFA/CO with obligations under the 95 SA is in direct conflict with the 95 SA itself. As the State knows, the 95 SA commitment to ship 65,000 cubic meters of transuranic waste out of the state by 2018 referred to only the post-1970 retrievably stored waste and not to any of the pre-1970 buried waste. In addition, the 95 SA states at Section G.1 that:

INEEL Environmental Restoration Program to Continue. DOE shall continue to implement the INEL environmental restoration program in coordination with Idaho and EPA. Such implementation shall be consistent with the schedules contained in the Federal Facilities Agreement and Consent Order (FFA/CO) entered into with the State of Idaho, EPA and DOE, and it shall include schedule requirements developed pursuant to the completed and future Records of Decision under the FFA/CO. The sole remedies for failure to implement the environmental restoration activities specified in the FFA/CO shall be those specified in the FFA/CO. [Emphasis added.]

Thus, the 95 SA acknowledged that DOE and the State of Idaho had no intent to alter or affect the implementation of CERCLA pursuant to the FFA/CO, and that schedules under the FFA/CO were not subject to any enforcement action or limitation under the 95 SA. This statement is consistent with the fact that:

(a) The 95 SA was an agreement between the State of Idaho and DOE, but did not include EPA, which under CERCLA Section 120 has final remedy selection authority at federal facilities listed on the National Priorities List. We cannot circumvent the CERCLA decision-making process through the 95 SA;

(b) The FFA/CO can only be amended "by unanimous agreement of the Parties . . . and shall be incorporated into" the FFA/CO itself (Part XXX of the FFA/CO), so the 95 SA clearly did not amend the FFA/CO; and

(c) The underlying litigation which the 95 SA resolved was based upon the federal National Environmental Policy Act (42 USC 4321 et seq.) and the Administrative Procedure Act (5 USC 551 et seq.), and was not premised upon nor asserted jurisdiction under CERCLA and indeed could not have been an attempt to unilaterally change the FFA/CO in light of the prohibition on litigation challenging CERCLA response actions set out by Congress in CERCLA Section 113(h).

For all the above reasons, the 95 SA is irrelevant to the extension of the OU 7-10 deadlines.

Response to the EPA Letter

DOE-ID will now respond to the comments made in Reference 3:

With respect to Paragraphs 3 and 4 of Reference 3, we would reiterate that the existing deadlines were calculated several years ago, without the benefit of a design and operating plan, and based on far less information and only a gross estimate of the time necessary for each element of the Stage II remedial action. Since then, the project concept has evolved from a relatively conventional, but remotely operated, excavation to a challenging process involving a hard-shell retrieval enclosure, removal of soil by remote-operator vacuuming excavation system of every individual 2'x2'x6" volume (requiring up to 200 separate cycles of operation for each foot of depth in the Stage II effort), and a remote-operator archeological-style method of collecting data during the process of removal. The requested new deadlines are based on much more specific analysis of the difficult process of exhuming waste contaminated with transuranic elements, collecting detailed information about both the character and location of each item, and preventing radiation exposure to workers and the public at large.

As a matter of clarification, we would point out that EPA and DEQ originally concurred in the judgment that siting preparatory to Stage II could be adequately carried out without the need to perform the coring elements of the original Stage I Work Plan, particularly when it was pointed out that carrying out all of the Stage I elements would add 2 years to the schedule. Although the ROD and the ESD contain no Stage II siting requirements, conducting a Stage II siting investigation was promoted by EPA and has been made a component of the schedule extension we are requesting. We appreciate EPA's commendation for the timely submittal of the Stage II design document, but in fact that very document points out the need for more time to execute the design than was originally estimated.

Paragraph 5 of Reference 3 misinterprets the statement in Reference 1, which was a comment on the additional work that sometimes results from the detailed direction given by EPA and DEQ during the weekly meetings that continue to be held on OU 7-10. Although there was no statement made about the review of draft documents, the purpose of that sentence was to point out the complexity of the process, not to identify a specific contributor to the proposed schedule. The EPA and DEQ comments on the Stage II 90% Design document were provided on time, but they also contain new requirements for substantial additional data collection and analysis. The time needed to meet these requirements contributes to the need to extend the OU 7-10 deadline.

With respect to Paragraph 6 of Reference 3, we are aware of suggestions that have been made to cut funding from all other remedial actions at the INEEL and divert it to OU 7-10. Our proposed schedule does not adopt that suggestion. The other remedial actions at the INEEL are being performed in compliance with the FFA/CO and signed RODs. EPA's proposal for adding certain equipment to the Stage II aboveground facility was evaluated but found to provide no benefit to safe operations. EPA also suggested the early procurement of major equipment, before detailed design was complete, but DOE-ID determined that this would create a significant risk of not getting equipment that meets design criteria. Such an action would also conflict with the DOE-ID acquisition strategy of using a single procure/build/operate subcontract to increase accountability in the project.

We appreciate the recognition in Paragraph 8 of Reference 3 that implementing Stage II of the OU 7-10 interim remedial action is a complex undertaking. No matter how important this project is, that complexity makes it imperative that it be done safely and with appropriate caution and care.

Conclusion

Inasmuch as Paragraph 9.2(e) of the FFA/CO prescribes that the Dispute Resolution Committee seek to come to agreement within 21 calendar days of receipt of the Statement of Dispute, I suggest a meeting in Boise, ID on Tuesday, March 27, 2001. The integration of the OU 7-10 ROD and the OU 7-13/14 RI/FS is very complex. The Committee has the option of remanding this issue to the FFA/CO Program Managers for further discussions or the development of additional information to support the Committee.

If you need further information on this matter, you can contact me at (208) 526-4392, by FAX at (208) 526-0598, and via e-mail at hainke@id.doe.gov.

Sincerely,

Kathleen E. Hain

Kathleen E. Hain, Director
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Enclosures: References 1 and 2, with attachments